

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CARPENTERS HEALTH AND	:	CIVIL ACTION
WELFARE FUND OF PHILADELPHIA	:	
AND VICINITY, ET AL	:	
v.	:	
	:	
	:	
MORAN GENERAL CONSTRUCTION,	:	NO. 92-3197
CO. A/T/A MORAN GENERAL		
CONTRACTORS and MORAN GENERAL		
CONTRACTORS, INC.		

ORDER AND MEMORANDUM

Yohn, J.

April , 1998

Plaintiffs (hereinafter "Carpenter") filed this action against Moran General Construction Company a/t/a Moran General Contractors and Moran General Contractors, Inc. (hereinafter collectively "Moran") on June 2, 1992 for non-payment of contractually required fringe benefit contributions. On February 25, 1994 the court entered judgment in favor of plaintiffs and against the Moran companies, jointly and severally, in the amount of \$712,846.77.

On January 22, 1996 plaintiffs filed a writ of execution directing the U.S. Marshal to levy upon all accounts of Multi-Trade General Contractors Inc. (hereinafter "Multi-Trade"), held by First Fidelity Bank, N.A., as garnishee. The writ of execution is based on plaintiffs' allegation that Moran made fraudulent conveyances to Multi-Trade on July 1, 1993 in the amount of \$9,000.00, on July 8, 1993 in the amount of \$8,700.00, on July 15, 1993 in the amount \$27,000.00 and on September 8, 1993 in the amount of \$70,000.00. Plaintiffs contend that when the money was paid by Moran to Multi-Trade that Moran was insolvent and that no adequate consideration was paid or given by Multi-Trade for the transfer (N.T. 27,28).

On February 22, 1996 plaintiffs filed a petition for judgment against garnishee in the

amount of \$17,150.19 which garnishee acknowledged it held in an account for Multi-Trade. Multi-Trade then filed an “application of non party to set aside execution secured through defective writ” based upon Pa.R.Civ.P. 3121(b) alleging that the monies in the Multi-Trade account were not the property of Moran.

By agreement, the trial proceeded on the petition of Multi-Trade to set aside the execution. After the filing of briefs, the court conducted evidentiary hearings. The parties thereafter submitted additional documentary evidence and affidavits by agreement of counsel.^{1 2}

FINDINGS OF FACT
Moran

Moran General Construction Company, Inc. is a Pennsylvania corporation with a registered fictitious name of Moran General Contractors. Moran General Contractors Inc. is a separate corporation. John Moran testified that both corporations and the fictitious name were used interchangeably and always treated by the principals as one and the same (N.T. p. 176).

The parties stipulated that Moran was owned and operated by John Moran and Bonnie Moran, husband and wife from 1983 through May of 1992. As a result of a bitterly contested divorce proceeding between John and Bonnie Moran the state court handling the divorce proceeding awarded exclusive control of the company to Bonnie Moran from May of 1992 through February of 1993. In February of 1993 it awarded exclusive control to John Moran (hereinafter “John”) who operated the business until it became inactive (N.T. pp. 3, 55). The

¹Plaintiffs make no claim of alter ego or of piercing the corporate veil.

²Plaintiffs do not contest Multi-Trade’s standing even though it has failed to move to intervene (N.T. p. 42).

checks at issue in this matter bore the name Moran General Contractors Inc.; however, John testified that they were actually checks from Moran General Construction Company, Inc. but that the checks were always in the name of Moran General Contractors which Bonnie had registered as a fictitious name (N.T. p. 75). for Moran General Construction Company, Inc. These distinctions are immaterial to the present proceeding. All four of the checks were payable to Multi-Trade.

Multi-Trade

John's children, Phyllis Moran (hereinafter "Phyllis"), John Moran, III (hereinafter "John III") and Chad Moran (hereinafter "Chad") worked as employees of Moran until February of 1993.

When John resumed control of Moran in February of 1993, he and Phyllis called all of the customers and suppliers to determine the amount of the debt of the company. It totaled \$600,000.00 (N.T. pp. 60-61). As of that date the company had no assets other than \$12,000.00 in the general account and \$800.00 in the payroll account (N.T. p. 63). Plaintiffs and Multi-Trade agree that Moran was clearly insolvent and that issue is not contested.

John testified that his children came to him in February of 1993 and stated that they did not want to work for Moran anymore because of the problems with Bonnie and the creditors so they had formed Multi-Trade (N.T. pp 66-67). Phyllis testified that the siblings decided in February of 1993 that they were tired of dealing with the divorce and the possibility that their step-mother might retake control of Moran so they wanted to start a business on their own and told their father about this decision.

The parties stipulated that Multi-Trade was formed as a partnership among the three

children in February of 1993 (N.T. pp. 3,4). The agreement was verbal. No written partnership agreement was prepared and the Multi-Trade name was not registered as a fictitious name (N.T. p. 258).

Multi-Trade was incorporated as a Pennsylvania corporation on June 25, 1993. The shareholders are Phyllis, John III and Chad. For federal income tax purposes the corporation elected to be treated as a subchapter S corporation.

Phyllis is president of Multi-Trade and a fifty one percent shareholder (N.T. p. 187). John III and Chad are the other shareholders. Multi-Trade had no bank account until July of 1993 when it received its first payment on a contract (N.T. p. 259).

Multi-Trade was incorporated using an address of 1817 Herbert Boulevard, Williamstown, New Jersey. Moran owned an office at I-95 and Concord Road in Chester, Pennsylvania. Because most of Multi-Trade's projects were in Pennsylvania, Multi-Trade used Moran's office to make phone calls or to send faxes (N.T. pp. 198-199). Others did as well. Multi-Trade paid no rent to Moran for the use of the office but paid one of the utility bills (N.T. pp. 108-109). Basically, Multi-Trade had a desk at the office which John allowed his children to use (N.T. p 110). From 1993 to 1995 both Moran and Multi-Trade used the same telephone number (497-1234) (N.T. p 206). In 1995 the telephone number was transferred to Multi-Trade (N.T. p. 207).

Multi-Trade purchased a fax machine, but used the same fax line as Moran (N.T. p. 111). For a period of time the letterhead on the fax machine stated that Multi-Trade was a division of Moran. Phyllis credibly testified that Multi-Trade was never a division of Moran, but that on one occasion she had the letter head made up stating this because it took six months to get on the

PECO bid list and she used this letterhead hoping that Multi-Trade would be able to get on the bid list without going through the normal procedures (N.T. p. 204). Although her conduct in thus deceiving PECO was obviously reprehensible, her explanation was credible (N.T. p. 204). Phyllis testified that she was unable to delete the letter head after initially using it due to her lack of proficiency in the technology of the fax machine (N.T. p. 111).

When Multi-Trade was established in February of 1993, John told his children that he may have subcontracts available for them to work on. The three subcontracts which Multi-Trade obtained from Moran during 1993 were, in fact, the only contracts Multi-Trade received during this time frame (N.T. p. 263). Multi-Trade contends that on each of these subcontracts it was the subcontractor for Moran and that Phyllis, John III and Chad were employees of Multi-Trade. Plaintiffs contend, on the other hand, that Phyllis, John III and Chad worked as employees of Moran on the three projects at issue and were paid salaries by Moran for that work.

PECO Project

Moran held the original contract with PECO as general contractor. John testified that Multi-Trade and other subcontractors bid on the work Moran was to perform for PECO and that Multi-Trade was the low bidder (N.T. pp. 131-132). Phyllis credibly testified that she was well qualified to prepare bids through her prior work for her father and that she prepared the PECO bid after calling material and equipment suppliers and that she and her brothers did the work on the PECO contract (N.T. p. 245) for Multi-Trade.

Multi-Trade's bid in the amount of \$70,000 was submitted on April 16, 1993 (Multi-Trade's Exhibit 6A). Multi-Trade received the contract from Moran in the amount of \$70,000 (Multi-Trade's Exhibit 6C). Multi-Trade was paid by Moran in July and September of 1993 by

checks which are the subject of this dispute.

The work on the PECO project was conducted from May 20, 1993 through at least September of 1993 (N.T. p. 241).

Multi-Trade rented equipment for the PECO project costing approximately \$13,000 and demolition suits costing \$2,500 (N.T. pp. 346-347).

The contract between Moran and Multi-Trade for the PECO project was a legitimate contract and Phyllis, John III and Chad performed work on the PECO project as employees of Multi-Trade.

Philadelphia Regional Port Authority Contract

Moran also had a contract with the Port Authority. John testified that a number of people bid on the Port Authority project and Multi-Trade's bid of \$13,571 was the lowest (N.T. pp. 129-130). Phyllis testified that she prepared the bid on behalf of Multi-Trade for the Port Authority project and that she and her brothers did the work. Her bid on behalf of Multi-Trade to Moran, dated March 10, 1993, in the amount of \$13,571 is contained in Multi-Trade's exhibit 5A. The contract was awarded by Moran to Multi-Trade on March 12, 1993 (Multi-Trade's Exhibit 5B). Multi-Trade submitted an invoice in the amount of \$13,571 dated June 10, 1993 (Multi-Trade's Exhibit 5C). Multi-Trade was paid that amount by checks dated July 8, 1993 and September 8, 1993 which are two of the checks at issue in this litigation (N.T. p. 130).

Multi-trade purchased ceiling tile for the Port Authority project which it paid for in the amount \$38,000 (N.T. p. 347).

Plaintiff's exhibit 45 demonstrates that John Moran submitted payroll certification forms to the Philadelphia Regional Port Authority on several occasions during April, May and June of

1993 which included John III and Chad as employees of Moran. However, John's testimony was so lacking in credibility that the court cannot credit his testimony or any documents prepared by him in any way.

The contract between Moran and Multi-Trade for the Port Authority project was a legitimate contract and Phyllis, John III and Chad performed work on the Port Authority project as employees of Multi-Trade.

U.S. Postal Service Contract

Moran held a contract with the U.S. Postal Service to do certain work at the Bellmawr, New Jersey Post Office. Phyllis prepared a bid on behalf of Multi-Trade in the amount of \$45,000 to do the work by estimating the time that it would take to do the work and multiplying it by the prevailing wage rate (N.T. p. 230). The bid submitted was on the basis that the work would be performed at a cost not to exceed \$45,000. The bid was submitted to Moran on February 7, 1993 (Multi-Trade's Exhibit 4A).

The work on the Bellmawr Post Office began February 14, 1993 and was completed by May 19, 1993. On May 19, 1993 Multi-Trade submitted an invoice to Moran in the amount of \$42,275 (N.T. p. 127). Multi-Trade was paid by Moran checks on July 8, 1993, July 15, 1993 and September 8, 1993, the payment checks being checks at issue in this litigation.

The contract between Moran and Multi-Trade for the U.S. Postal Service project was a legitimate contract and Phyllis, John III and Chad performed work on Postal Service project as employees of Multi-Trade.

At each of the three projects, Multi-Trade performed the work of a subcontractor pursuant to Moran's purchase order and job site specifications. Moran received sufficient consideration

for the price of its purchase order from Multi-Trade by Multi-Trade's commercially reasonable performance of subcontracting work pursuant to Moran's purchase order and job site specifications, and Multi-Trade received the benefit of its contract by being paid the amount agreed upon for the subcontracting work it performed.

The total billed by Multi-Trade to Moran for the three projects was in excess of \$125,000. Moran paid Multi-Trade \$114,700 by virtue of the checks at issue and approximately \$8,000 through advances to the siblings by Moran during the course of the projects when Multi-Trade was unable to pay the siblings because it had no funds. There is, therefore, a small balance still owing Multi-Trade by Moran (N.T. pp. 269-270).

Purchase of New Jersey Real Estate

On September 30, 1993, Phyllis, John III and Chad, as individuals, purchased a parcel of real estate in Monroe Township, Gloucester County, New Jersey to use as an office for Multi-Trade. The property was paid for by cash in the amount of \$46,000 (N.T. p. 221) (Multi-Trade's Exhibit 19).

Phyllis testified that the three siblings worked from February to September of 1993 without being paid by Multi-Trade because Multi-Trade did not have any funds to pay them and that when Multi-Trade received the payments for its work from Moran the siblings decided to purchase this real estate for use in Multi-Trade's business. Each sibling drew a salary payment of \$13,000 from Multi-Trade to purchase the real estate. The amount of the withdrawals was decided upon because that is the amount of money which was needed to purchase the real estate (N.T. pp. 215-216, 222). The federal income tax treatment of these withdrawals, as explained by Phyllis, is questionable at best. The real estate has, however, been used to store Multi-Trade's

equipment and to provide an office for Multi-Trade.

Moran Advances to Siblings

A number of checks were issued by Moran to the siblings individually in the amount of \$501.48. Phyllis testified that these payments were made by Moran during a time when Multi-Trade did not have any money. The children needed money to live on and Moran issued the checks on an irregular basis and then deducted the amounts from the purchase orders. The amount was computed by allotting a gross of \$750 and a net pay of \$501.48 (N.T. pp. 252-255, 217-218).

Moran issued IRS Form 1099s to the siblings because the siblings were not employees of Moran but were employees of Multi-Trade. Phyllis testified that she received the 1099s from Moran for the siblings and gave the appropriate ones to her brothers.

In August of 1993 after Multi-Trade received payments from Moran, the siblings began receiving a salary of \$500 per week from Multi-Trade (N.T. p.236).

IRS Form 941 Taxes

The affidavit of Phyllis Moran dated February 5, 1997, which the parties have agreed is part of the evidence in the case includes a copy of a check by Multi-Trade dated September 15, 1993 to First Fidelity in the amount of \$3,436. The date when it was actually processed by the bank is not decipherable. Phyllis stated that this was a payment of Multi-Trade's employer's quarterly federal tax for the tax period ending September 30, 1993 ("941 tax").

Plaintiffs' exhibit 63, admitted by agreement, contains the certification of the Internal Revenue Service that Multi-Trade never filed a 941 Employer's Quarterly Withholding tax return with the IRS during 1993, but that IRS did receive the tax payment in the amount of \$3,436

(Plaintiffs' Exhibit 64) which was deposited on September 15, 1993.

Multi-Trade's exhibit 22 constitutes a form 941 tax return for the third quarter of 1993 for Multi-Trade. However, the IRS records confirm this was never filed. The tax due for the quarter according to this return is \$6,920 which does not square with the payment of \$3,436 which was made.

Phyllis' affidavit confirms that no 941 tax returns or payments were required for the second and forth quarters of 1993 because Multi-Trade made no payments to any employees during that period of time.

The payment of \$3,436 represented the payroll taxes for the PECO contract.

Multi-Trade's Federal Income Tax Return

Multi-Trade's exhibit 27 is a form 1120S U.S. Income Tax Return for a Subchapter S corporation for 1993. It was prepared on the basis of the information contained in the books and records of Multi-Trade (N.T. p. 18). Phyllis' affidavit of May 30, 1997, admitted into evidence by agreement, states that Multi-Trade's exhibit 26 was an application for automatic extension of time to file the corporate income tax return and that exhibit A states that IRS received the application on March 16, 1994 and that it was approved on April 18, 1994 until September 15, 1994.

The signed copy of the income tax return is dated January 16, 1996, well after the extension, but six days prior to the filing of the garnishment at issue. IRS has no record of its being filed at that time.

Phyllis filed Multi-Trade's tax return on May 30, 1997 after learning that IRS had confirmed it had not received the tax return previously.

Multi-Trade's tax return for 1993 shows gross receipts of \$114,700. It shows compensation of officers of \$32,250 and ordinary income of \$31,371. Of that ordinary income \$31,316 is listed as a property distribution including cash. The officer's compensation is \$5,250 to Phyllis, \$14,250 to John III and \$12,750 to Chad. It also shows payroll taxes of \$5,471 and liability for payroll tax payable of \$16,164. The schedule K-1 attached to the return shows ordinary income to Phyllis of \$10,457 and a property distribution of \$10,439. Similar K-1s were attached for John III and Chad.

Multi-Trade was not obligated to pay any federal income taxes during 1993 because it is a Subchapter S corporation.

Multi-Trade alleges that the payroll taxes on the first page of the tax return represent those taxes incurred by the corporation based on the salary of the officers and labor costs. The unpaid payroll taxes in the amount of \$16,164 are allegedly accrued taxes but not payable as of the end of the year. No evidence was submitted to support or contradict these allegations.

Siblings' Federal Income Tax Returns

Phyllis submitted a copy of her form 1040 U.S. Individual Income Tax Return for 1993 dated March 24, 1994. It shows W-2 income and a W-2 form from Multi-Trade in the amount of \$5,250 and form 1099 income and a form 1099 from Moran in the amount of \$1,543 (Multi-Trade's Exhibit 23).

John III's form 1040 U.S. Individual Income Tax Return (Multi-Trade's Exhibit 25) shows W-2 income from Multi-Trade in the amount of \$14,250 and form 1099 income from Moran in the amount of \$1,771.

Chad's form 1040 U.S. Individual Income Tax Return (Multi-Trade's Exhibit 24) shows W-2 income of \$12,750 from Multi-Trade and form 1099 income from Moran in the amount of

\$3,864).

Phyllis testified that she gave John a copy of the advances which the siblings had received from Moran and she assumed that he prepared the 1099s on the basis of the information (N.T. pp. 77-78).

The W-2 forms issued by Multi-Trade to Phyllis, John III and Chad state that income and form 941 employment taxes were withheld in the amount of \$9,379 but there is no proof that any such sum has been paid to IRS. It would appear clear that the siblings owe additional income taxes and Multi-Trade owes additional payroll taxes. The siblings seem to acknowledge this but explain that the Multi-Trade corporate return had not been completed when they filed their individual tax returns for 1993 so that they did not have the K-1 forms necessary to complete their individual income tax returns. They acknowledge that the individual returns will now have to be amended to reflect the additional income and they will be liable for additional taxes, interest and penalties.

Multi-Trade has established by clear and convincing evidence that the siblings were not employees of Moran in connection with the work performed for the 3 projects, that the siblings were in fact employees of Multi-Trade during that time, that the parties stipulated that the siblings formed a partnership under the name of Multi-Trade in February of 1993, that Multi-Trade was incorporated on June 25, 1993, that Multi-Trade used a computer generated letter head bearing its name, that Multi-Trade had 3 legitimate subcontracts with Moran, that Multi-Trade performed the work for Moran through the labor of the siblings and others and the purchase by Multi-Trade of supplies and equipment for the projects, that Moran received fair consideration

for its subcontracts from Multi-Trade in the form of the labor of the siblings and the supplies and equipment purchased by Multi-Trade for use in performing the subcontracts, that Multi-Trade received fair consideration from Moran in the form of the cash payments at issue in this matter which were the agreed upon prices for the subcontracts, that Multi-Trade had the use of a desk and chair and telephone and fax line at the office of Moran (but this would be nothing more than would be expected from a father for his children who are starting a fledgling business), that Phyllis was competent to and did prepare the bids by Multi-trade to Moran for the 3 projects, that Moran issued form 1099s to the siblings for limited payments made to the siblings during 1993 which confirms that they were not employees of Moran, that Multi-Trade issued W-2 forms to the siblings during 1993 for their wages which demonstrated that they were employees of Multi-Trade, that Multi-Trade made a deposit of \$3,436 to the Internal Revenue Service on September 15, 1993 representing payroll taxes owed for the third quarter of 1993 and that each of the siblings filed Form 1040 individual tax returns in March of 1994, before this litigation began, which showed W-2 wages from Multi-Trade as employees and Form 1099 payments from Moran as miscellaneous income.

CONCLUSIONS OF LAW

The Uniform Fraudulent Conveyance Act (“UFCA”), 39 Pa.C.S.A. §351-363 covers fraudulent transfers that occurred in Pennsylvania before February 1, 1994. The UFCA was repealed and reenacted as the Uniform Fraudulent Transfer Act (“UFTA”), 12 Pa.C.S.A. §5101-5110, covering all transactions that occurred on or after February 1, 1994.

The transactions at issue in this matter were the cash payments (i.e. conveyances) made from Moran to Multi-Trade in July and September of 1993 so that the Uniform Fraudulent Conveyance Act applies.

Section 354 of the UFCA provides that: “Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration” (emphasis added) 39 P.S. 354.

The parties stipulated that Moran was not solvent at the time the payments in question were made; therefore, the question at issue is whether fair consideration was given for those payments.

Section 353 of the Uniform Fraudulent Conveyance Act provides that: “ Fair consideration is given for property or obligation:

(a) When, in exchange for such property or obligation, as a fair equivalent therefor and in good faith, property is conveyed or an antecedent debt is satisfied; or

(b) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property of obligation obtained.” 39 P.S. § 353.

“If the person conveying the property was in debt at the time he made the conveyance, then the burden rest upon the grantee or grantees to establish, by clear and convincing evidence, either that the person conveying was then solvent and was not by such conveyance rendered insolvent or that a fair consideration had been paid for the conveyance. First National v. Hoffines 239 A2d 458 (Pa. 1968).

The parties agree that §354 of the UFCA is the applicable statute and that the burden of proof as allocated in Hoffines applies to the facts at issue.

The court has found that Multi-Trade proved by clear and convincing evidence that fair consideration was given by Multi-Trade for the cash payments at issue and that Moran received

fair consideration for those payments.

Plaintiffs rely on the decision of the Delaware County Court of Common Pleas in *Menold v. Moran General Contractors, Inc.*, No. 93-3907, August 18, 1995 which concluded that John diverted \$112,700 from Moran to Multi-Trade. However, neither Multi-Trade nor any of the Moran siblings were parties to that action or in privity with parties to that action so that principles of res judicata and collateral estoppel do not apply.

The checks issued by Moran to Multi-Trade in July and September of 1993 were not fraudulent conveyances and the writ of execution of plaintiffs issued on January 22, 1996 against Multi-Trade will be set aside as defective.